SUPREME COURT OF THE UNITED STATES.

October Term, 1945

No. .....

DAISY I. MORGAN, Executrix of the Estate of CELESTE SMITH MURRAY, Deceased, *Petitioner,*

vs.

FRANK T. HINES, as Administrator of Veterans Affairs, *Respondent.*

ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The United States Court of Appeals for the District of Columbia held that allegations of the complaint were not sufficient to show that the plaintiff was entitled to reinstatement of the policy in question.

The motion to dismiss the complaint admits all of the material facts pleaded in the complaint.

Kithcart v. Metropolitan Life Insurance Company, 88 F. 2d. 407.

Winget v. Rockwood, *et al.,* 69 F. 2d. 326.

Henderson v. Binkley Coal Co., 74 F. 2d. 567.

District of Columbia v. Selden, 68 F. 2d. 988.

Work v. U. S. *ex rel.* Rives, 267 U. S. 175, 69 L. Ed. 561.

It admits for the purpose of this petition the fact that the Administrator of Veterans Affairs was charged by law

with the reinstatement of lapsed insurance policies, and that there is no evidence to sustain the decision that the policy was not entitled to reinstatement, and that all of the evidence showed that the insured was in good health as of February 28, 1934, and March 4, 1934, when the premiums were paid.

The policy contained the following provision as to the reinstatement of the policy (R. 2):

> "This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy."

It is to be noted that if the policy has not been surrendered for a cash surrender value the Director of the United States Veterans Bureau (now the respondent in this action) has the right to reinstate the policy upon payment of premiums and evidence that the insured is an insurable risk.

The regulation upon which the question of the reinstatement of the insurance policy is predicated is set forth in the opinion of the Court below, and is as follows:

> "3079. United States Government life insurance may be reinstated:
> "(A) Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was at the due date of the premium in default.
> "3080. The applicant for reinstatement of United States Government life insurance must furnish during his lifetime, and before becoming totally and perma-

nently disabled, a written application signed by him which shall state that he is in as good health as at date of lapse, or that he is in good health, in accordance with the requirements of the particular case; and in addition the applicant shall furnish such evidence relative to his physical condition as may be required by the director on such forms as the director may prescribe: PROVIDED, That if the insurance becomes a claim after tender of the amount of the premiums required but before full compliance with the requirements of this paragraph, and the applicant was in the required state of health at the date that he made the tender of the amount of premiums, and that there is a satisfactory reason for his noncompliance, the director may, if the applicant be dead, waive any or all of the requirements of this paragraph, or if the applicant be living, allow compliance with this paragraph, as of the date the required amount of premiums was received in the bureau."

There is a difference between the regulation and the policy. The provisions of the policy requires only the payment of all premiums "which are in arrears" and the furnishing of evidence of insurability. The regulation makes an additional requirement that "there is a satisfactory reason for his non-compliance."

This requirement imposes a condition not required under the terms of the policy. In fact, the language is so loose that no one could comply with its conditions, as the regulation does not set forth what is required as a "satisfactory reason". The regulation writes into the insurance policy an extra condition, a requirement for reinstatement. As a matter of actual practice the regulation requiring a satisfactory reason for non-compliance has never been enforced by the Veterans Administration.

The answer filed by the respondent in this case justifies the refusal of the respondent to reinstate the policy upon the grounds that the insured was not in good health (R. 12). It is no where alleged that the no satisfactory excuse was presented.

The Court below overlooked the fact that the complaint alleges (R. 3) that at the time the premium payment of $7.00 was paid on February 28, 1934, and the further premium payment of $14.00 was made on March 4, 1934, the said Powhattan Powers Murray was then in good health and an insurable risk and was entitled to a reinstatement of the Policy No. K-852,467 under the terms of said policy and under the acts of Congress relating thereto.

Under the policy only two requirements were necessary: first, the payment of the premiums in arrears; and second, proof that at the time that the premiums were tendered the insured was in good health.

Both of these conditions were complied with. All premiums in arrears were paid under the policy.

The law appears to be well settled that in acting on a reinstatement of a policy the insurer cannot impose conditions other than those required by the policy. The respondent could not require more than proof that the insured was in good health when the premiums were tendered and that the requisite amount of the premiums were in fact tendered. As stated above, the law here seems to be well settled, that no conditions other than those were required by the policy are to be imposed.

45 Corpus Juris, 121, citing:

Old Colony Life Insurance Company v. Graves, 200 Ill. A 71.

Arrison v. Supreme Council, 129 W. W. A. 303, 105 N. W. 508.

Colley v. Wilson, 86 MO A 396.

Loundsbury v. Maccabees, V. M. 128 App. Div. 394, 112 N. Y. S. App. 921, Aff. 199 N. Y. 573.

Modern Order of Praetorians v. Kennedy, 157 Pacific 926.

Texas Supreme Lodge N. R. A. v. Turner, 19 Texas Civ. A 346, 47 Southwestern 44.

There are no statutory provisions under any of the acts administered by the Veterans Administration relating to the granting or reinstating of government life insurance such as here is sued upon, as require a satisfactory reason for the failure to pay premiums on the due date.

It is the contention of the petitioner that under the undisputed facts and the law applicable, the respondent had only a ministerial duty to perform—the matter of reinstating the policy in question. The petitioner was entitled to reinstatement of the policy because under the terms of the policy the policy was entitled to be reinstated at a time when the insured was in good health and by the payment of the requisite payments. It is conceded that the premium payments made were sufficient to pay all premiums in arrears as is required under the terms of the policy.

The petitioner concedes that if the insured had not in truth and fact been in good health and there had been any evidence of that character presented to the respondent that the respondent would have been vested with the discretion in the matter of the reinstatement of the policy. But that is not the fact in this case. The complaint alleges and the Motion to Dismiss admits that all of the evidence before the respondent with reference to the reinstatement of the policy in question showed that the insured at the time of the payment of the premiums was in good health. In view of the fact that every compliance was made with the requirement as to reinstatement and there is no evidence that the insured was not in good health, the duty of the respondent became a purely ministerial one. This Court in considering this case is not dealing with a case where an administrative officer had evidence upon which he could have exercised his discretion. If it were such a case, the petitioner admits that there is no basis for a suit in the nature of a mandamus. The case is simply one in which the respondent ignores the evidence as to the good health of the insured

and has simply refused to perform his ministerial duty in the matter of the reinstatement of the policy. The case is predicated upon those decisions which hold that an administrative officer may have a discretion where there is conflicting evidence, but where the evidence shows that only a reasonable man could reach one conclusion in the matter, the action is not one of discretion but rather of a ministerial duty on the part of the administrative officer. This rule has long since been recognized by the Courts. This Court in the case of *Wilber v. U. S., ex rel. Kadrie, et al.*, 281 U. S. 206-222, 74 L. Ed. 809, held that a mandamus would lie to compel an officer to perform a ministerial duty. This followed the decisions herein made by this Court in the case of *U. S. v. Schurz*, 102 U. S. 378; 26 L. Ed. 167.

The respondent had purely a ministerial duty to perform in this case. The United States Court of Appeals below held that under the regulations the word "may" in reference to the reinstatement would have to be construed as "must" in order to enable petitioner to prevail in this case.

The law has long been settled by repeated decisions of this Court that the word "may" in a statute must be construed as "must" where the legislature means to impose a positive and absolute duty upon an administrator. *Minor v. Mechanic's Bank*, 1 Pet. 46-88, 7 L. Ed. 47; *Supervisors v. United States*, 4 Wall. 446, 18 L. Ed. 419. In the case of Supervisors v. U. S., *supra*, this honorable Court said that "where a power is given to public officers whenever the public interest or individual rights call for its exercise the language used although permissive in form is in fact peremptory. In all such cases, it is held that the intent of the legislature was not to devolve a mere discretion but to impose a positive and absolute duty." The case of Supervisors v. U. S. *supra* was cited with approval in the case of *U. S. v. Steamboat Co.*, 202 U. S. 192, 50 L. Ed. 991, and it was held in that opinion that the Secretary of the

Treasury could not arbitrarily refuse to allow refunds of duties provided for in the statute although it might involve some discretion upon his part. This Court also held in the case of *U. S. v. Silberschein*, 266 U. S. 221, 45 Sup. Ct. 69, that while, as a general rule, the Courts had no authority to entertain suits in compensation payments under the provisions of the War Risk Insurance Act, and that the decision of the Director of the Veterans Bureau could not be reviewed in the ordinary case, that a review might be had where such decision was arbitrary, capricious or contrary to law. While Congress by the Economy Act of March 20, 1933 made the decision of the Director of the Bureau final and conclusive and not subject to Court review, the case of U. S. v. Silberschein *supra* is cited for the reason that this Court held that even in compensation matters a review might be had where the decision was capricious, arbitrary and contrary to law. In this case we are not dealing with the matter of a gratuity; we are concerned with contractual rights under a policy of insurance in which the respondent has acted arbitrarily, capriciously and contrary to the law.

Even though the respondent was vested with a discretion in the matter of the reinstatement of the insurance, the Courts unanimously hold that such a discretion in relation to other matters must be reasonable and not arbitrary, unlimited or absolute discretion.

The 7th Circuit Court of Appeals in the case of *U. S. National Bank v. Sullivan*, 69 Fed. 2nd 412, 415, 7th CCA, said that the discretion of a trustee must be reasonable not arbitrary, unlimited or absolute discretion. It is the same type of a discretion with which the trial court is vested. The discretion does not extend to arbitrary and unreasonable acts. *In re Dickinson Co.*, 104 Fed. (2) 771, 775, 7th CCA, the discretion is abused when the judicial

action is arbitrary fanciful or unreasonable, *Delno v. Market Street Railway*, 124 Fed. (2) 965, 9th CCA.

The United States Court of Appeals below has held to the same effect. *U. S. v. Custis*, 35 App. D. C. 247. It was held in that case that the Board of Medical Examiners had a reasonable discretion in admitting to practice physicians who qualified in an outside jurisdiction, but that they could not arbitrarily or capriciously deny an application for a license to practice medicine when the law and the facts showed that the applicant was entitled to receive his license.

Despite the decision of the United States Court of Appeals below in this case, that Court had already held that the respondent could be required to reinstate a policy of insurance. It so held in the case of *U. S. ex rel. Lyons v. Hines*, 103 Fed. (2nd) 373; 70 App. D. C. 36. The decision in this case clearly conflicts with their ruling in the case of U. S. *ex rel.* Lyons v. Hines, *supra*. The two decisions cannot be reconciled.

The Court below has also held that the respondent could be required to perform his ministerial duties and so held in the case of *U. S. v. Hines*, 105 Fed. 2nd 85, 70 App. D. C. 206.

Citing not a single decision to justify its unusual, and without precedent, opinion in this case, the Court below concludes that the respondent has an absolute and dictatorial discretion in the matter of reinstatement of government insurance policies. This question is of vital importance to millions of policyholders of the government. The Court below laid down the rule that no matter if all of the evidence showed that the insured was in good health and that the premiums were paid, the respondent had no duty of carrying out the terms of the policy to reinstate the insurance contract. This ruling is contrary, as far as

is known, to all precedents and this Court, in the exercise of its supervisory powers should take jurisdiction in this case because of the importance of the decision to the great number of policyholders holding government insurance contracts. Unless the respondent can be compelled to reinstate this policy of insurance the petitioner is without remedy. Meadows v. U. S., 281 U. S. 271, 74 L. Ed. 852.

The petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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